

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

D. DEAN FORD,)
)
Plaintiff,)
)
vs.) 1:06-cv-1502-RLY-TAB
)
ALLEGHENY LUDLUM,)
)
Defendant.)

**REPORT AND RECOMMENDATION ON
DEFENDANT'S MOTION TO DISMISS**

This cause is before the Court on Defendant's motion to dismiss for failure to prosecute and/or as a sanction for failure to comply with discovery. [Docket No. 28.] The Court held a hearing on March 4, 2008, to address this motion and related matters. Plaintiff appeared in person, and Defendant appeared by counsel. Both parties were given an opportunity to present evidence and argument. For the reasons set forth below, and as more fully set forth on the record, the Magistrate Judge recommends that Defendant's motion to dismiss be denied.

As set forth in Defendant's motion, Defendant has had significant difficulties in communicating with Plaintiff, which has delayed the orderly development of this action. While there are multiple causes of these communication difficulties, one such cause is that Plaintiff's mailing address is a post office box (not a street address), which due to his indigent status and related issues he is able to access only on Sundays. Plaintiff advised the Court at the hearing that the Post Office clerk's window is not open on Sundays, so he cannot access items sent to him by certified mail—a process Defendant has utilized. [Docket No. 29 at ¶ 6.] In addition, Defendant contends that Plaintiff is refusing to execute medical and other releases, and will not cooperate in

completing his deposition. At the hearing, Plaintiff indicated a willingness to sign the releases, but questioned whether Defendant has already exceeded the presumptive seven-hour deposition limit in Fed. R. Civ. P. 30(d)(2).

While Defendant's motion sets forth additional issues, the foregoing synopsis represents the critical areas of disagreement between the parties. In the Magistrate Judge's view, these issues do not justify dismissal of this action for failure to prosecute or as a sanction. To the extent that Defendant is experiencing discovery difficulties (i.e., Plaintiff's refusal to sign medical authorizations or failure to cooperate to complete his deposition), these are discovery issues more properly resolved by way of a motion to compel. Defendant did not file a motion to compel, but instead jumped directly to a dismissal request. This request is premature.

Plaintiff signed the disputed releases at the time of the hearing, and by separate order a schedule has been established to complete Plaintiff's deposition and file dispositive motions. In addition, Plaintiff has represented to the Court and to counsel his proper email address for service.¹ Thus, the Court has addressed and resolved the issues that formed the bases of Defendant's dismissal request. For these reasons, the Magistrate Judge recommends that Defendant's motion to dismiss for failure to prosecute and/or as a sanction for failure to comply with discovery [Docket No. 28] be denied.

Any objections to the Magistrate Judge's Report and Recommendation shall be filed with the Clerk in accordance with 28 U.S.C. § 636(b)(1), and failure to file timely objections within the ten days after service shall constitute a waiver of subsequent review absent a showing of

¹Plaintiff is advised that while Defendant will serve Plaintiff via this email address, the Court will continue to send its entries to Plaintiff via regular mail at his post office box. The Court does not utilize electronic filing and service for *pro se* parties.

good cause for such failure.

Dated: 03/04/2008

T. Baker

Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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